IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 150 of 2002
with
CIVIL APPLICATION No 7248 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANISHKUMAR RAMNIKLAL PATEL

Versus

RAMNIKLAL GORDHANDAS PATEL

Appearance:
1. Second Appeal No. 150 of 2002
MR AS VAKIL for Petitioner No. 1
MR RD DAVE for Respondent No. 1

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: /10/2002

C.A.V. JUDGEMENT

1. Manishkumar Ramniklal Patel, appellant - original plaintiff has filed this appeal against the judgment and decree dated 4th September, 2002, passed by the learned Jt.District Judge, Bhavnagar, in Regular Civil Appeal No.65 of 2002. The learned Judge by his impugned judgment was pleased to dismiss the appeal and confirmed the judgment and decree dated 1st July, 2002, passed by the learned 5th Jt.Civil Judge (J.D.), Bhavnagar, in

2. For the sake of convenience the parties may be referred to as appellant as plaintiff and respondent as defendant.

3. The facts giving rise to this appeal are as under:-

3.1 Plaintiff is a son of defendant. The defendant being a senior citizen aged 86 years. There is a property bearing Plot No.1963 ad-measuring 1252.19 sq.mt. situated at Krishnanagar of Sindhunagar, Bhavnagar (hereinafter referred to as `the suit property'). The said property was ownership and possession of Ramniklal Gordhandas Patel - HUF property.

3.2 From the facts it has been emerged the defendant decided to sell out of suit property for which he has given public notice on 6.12.2000 in Saurashtra News Paper.

3.3 In view of the aforesaid action on the part of the defendant, the plaintiff filed suit No.170 of 2001 on 28th March, 2001, for a declaration that the suit property - (bearing Plot No.1963 situated at Sindhunagar, Bhavnagar) is a joint family property ancestral property and for a further declaration that the defendant has no right to transfer, assign, sell etc. and also for a permanent injunction restraining the respondent from transferring, assigning, alienating etc. the suit property. Alongwith the suit, the plaintiff had also filed an application under Order 39 Rules 1 and 2 of the Code of Civil Procedure read with Sec.151 of the CPC for temporary injunction in terms aforesaid. However the said application for temporary injunction was dismissed by the trial court by order dated 31.7.2001.

3.4 On the issuance of summons, the defendant appeared in the suit and filed a written statement at Exh.9. In the written statement the defendant contended that the suit property belonging to exclusively possession of defendant and nobody has right in the suit property. He has therefore right to alienate, transfer or assign the suit property.

3.5 Thereafter the trial court framed the necessary issues at Exh.27. The parties led oral evidence before the trial court. As the plaintiff was tried to delay the proceedings the defendant had given an application to the District Judge to conduct the suit on day-to-day basis.

The learned District Judge, Bhavnagar, has brought the same to the notice of the trial court vide Exh.28 on 4th September, 2001.

3.6 It may be noted that after the aforesaid letter by learned District Judge to the trial court the suit kept for hearing on 25th September, 2001.

3.7 It appears from the record that plaintiff asked for adjournments being applications Exhs.29, 31, 35, 36, 37 and 38. All these adjournments applications were granted by the trial court. Thereafter plaintiff gave an application Exh.39 for adjournment which the trial court rejected the same by its order dated 7th November, 2001.

3.8 Being aggrieved and dissatisfied with the said order plaintiff filed a Misc.Civil Application No.113/01 before the trial court to restore the suit. On that application the trial court passed an order on 17th January, 2002, and restored the suit on certain conditions for which one of the condition that plaintiff must co-operate and proceed with the matter.

3.9 After the said order, the court issued notice to the parties and directed to the parties to remain present on 18th February, 2002. After the said notice was served the plaintiff again asked for adjournment by applications Exhs.40, 41, 44 and 45 which the trial court granted the applications for adjournments. Thereafter plaintiff evidence was recorded by Exh.46 on 22nd March, 2002, and thereafter the matter was kept on 30th March, 2002, for further evidence.

3.10 It appears from the record that on 30th March, 2002, plaintiff did not remain present and thereafter the plaintiff gave another application Exh.47 and 48 for which the trial court granted the application Exh.47 but as regard Exh.48 the trial court did not grant the same and the trial court has closed the evidence of the plaintiff. Thereafter again matter was proceeded on 8th April, 2002, and again matter was kept on 10th April, 2002, and on both the days neither the plaintiff nor his advocate remained present.

3.11 Thereafter defendant's evidence was recorded at Exh.49. As plaintiff failed and neglect to remain present, the defendant evidence was closed by Exh.50 in this behalf and matter was kept for argument.

3.11(A) Thereafter plaintiff filed application Exh.51 for again reopening of the suit. On that application the

trial court by its order dated 15th April, 2002, dismissed the same. After the dismissal the plaintiff expressed a desire that he intend to file revision application against the same and for that plaintiff filed applications Exhs.52, 53 and 55 which were granted by the trial court. However when the plaintiff filed an application Exh.56 before the trial court, the trial court did not grant the said application Exh.56 and passed the judgment and decree by its order dated 1st July, 2002, dismissed the suit of the plaintiff.

3.12 Being aggrieved and dissatisfied with the said judgment and decree of the trial court, the plaintiff filed Regular Civil Appeal No.65/2002 before the learned Jt.District Judge, Bhavnagar. The said appeal was filed on 15th July, 2002. The said appeal thereafter heard by the learned Judge. The learned Judge by his impugned judgment and decree dated 4th September, 2002, pleased to dismiss the said appeal of the plaintiff.

3.13 Being aggrieved and dissatisfied with the said judgment and decree of the learned District Judge, the plaintiff has filed present Second Appeal under Section 100 of the Code of Civil Procedure before this Court on 9th October, 2002.

3.14 The matter was heard by me from time to time. The matter was first heard by me on 11th October, 2002, and at that time this Court felt that this being a dispute between father and son and therefore the Court may try to settle the matter. Accordingly the parties remained present before this Court on 18th October, 2002. This Court made some efforts to see that the parties may amicably settle as parties are father and son. But unfortunately the matter could not be settled. Therefore I have heard Mr.A.S.Vakil, learned advocate for the appellant in this behalf.

4. Mr.A.S.Vakil has pointed out all these facts and made several submissions. He has relied upon Order 41 Rule 23A of the CPC. He submitted that in view of the peculiar facts and circumstances of the case the District Court ought to have remanded the matter to the trial court as plaintiff did not get the fair opportunity of being heard before the trial court.

4.1 He submitted that the trial court as well as the appellate court has failed to appreciate that once the order dated 17th January, 2002, was passed on the plaintiff's Misc.Civil Application No.113/2001, the suit was restored and was to be proceeded with in the manner

suggested in the said order dated 17th January, 2001. In fact even the said order dated 17th January, 2001, clearly permitted the plaintiff to apply for adjournment, albeit for a reasonable cause. The order dated 17th January, 2001, did not impose absolute bar on the plaintiff's right to apply for adjournment, if necessary. The trial court therefore could not have rejected any application for adjournment that was made by the appellant by relying upon the order dated 17th January, 2001, passed in the Misc.Civil Application No.113/2001 without recording or coming to the conclusion that the application for adjournment was for a reasonable cause. He further submitted that the adjournments were applied by the plaintiff for a reasonable cause. He further submitted that the manner in which the trial has proceeded subsequent to the order of restoration dated 17th January, 2002, suggesting clearly and unequivocally that there has not been a proper trial at all, there has been violation of the principle of natural justice and no reasonable, just and fair opportunity has been given to the plaintiff in the manner of conducting the trial.

4.2 In support of the aforesaid contentions, he has relied upon the followings judgments:

(1) The judgment of Allahabad High Court in the case of Anwar Hussain and others Vs. S.L.Franklin and others reported in AIR 1958 Allahabad 562 wherein it has been observed that the civil court has inherent power of remand where there has been no proper trial.

(2) In the case of Balmiki Singh and others Vs. Smt.Lalpari Devi and others reported in AIR 1981 Patna 61 particularly paras 11, 12 and 13.

(3) In the case of Suresh Kumar Chowkse vs. State of M.P. and another reported in AIR 1986 Madhya Pradesh 130, particularly para 4 wherein the Court has interpreted Order 41 Rule 23-A of CPC.

(4) In the case of Smt.Umrao Bai and others Vs. Sardarilal Khatri reported in AIR 1997 Madhya Pradesh 62 particularly para 9.

5. On the other hand Mr.R.D.Dave, learned advocate for the respondent has stated that this being a second appeal, the appellant has failed to show any substantial question of law and, therefore the second appeal is not maintainable. He has relied upon the judgments reported

in AIR 1999 SC 2213, AIR 2001 SC 965 and AIR 1998 SC 970.

5.1 Over and above on merits of the matter learned advocate for the respondent submitted that in this case it is no doubt true that the trial court was constrained to dismiss the suit as the plaintiff has completely abuse the process of law by asking unnecessary adjournments. He submitted that the respondent being a senior citizen aged 86 years old, plaintiff though happened to be a son of respondent, the whole idea of the plaintiff is to delay the matter by taking unnecessary adjournments so that the entire proceedings may be abated. He submitted that though the trial court dismissed the suit on 7th November, 2001, before that the trial court had given ample opportunity of being granted adjournments to the plaintiff in this behalf. Moreover on 17th January, 2002, the trial court had granted the Misc.Civil Application No.113/01 on certain conditions for which one of the condition that the plaintiff should proceed with the matter as early as possible, and no adjournments will be granted in this behalf. He further submitted that on 17th January, 2002, the trial court had issued notice to the parties and directed the parties to remain present before the court on 18th February, 2002, even though the plaintiff had given application Exhs.41, 44 and 45 for asking adjournments, for which the trial court had also granted the said application in this behalf. It was further submitted that on 22nd March, 2002, the plaintiff's evidence was examined at Exh.46 and the matter was again kept on 30th March, 2002, for recording further evidence of plaintiff, however the plaintiff did not remain present on that day and submitted application Exh.47 for adjournment which was granted by the trial court. Thereafter application Exh.48 was rejected by the trial court and the trial court has closed the evidence of plaintiff in this behalf. Thereafter again defendant was examined and as plaintiff failed and neglect to appear the defendant had given application Exh.50 for closing down of his evidence.

5.2 He further submitted that thereafter the plaintiff filed an application Exh.51 for re-hearing of the suit and also decided to file revision application before the High Court. The trial court granted application Exh.52, 53 and 55 but did not grant the application Exh.56 and passed the judgment and decree in this behalf. He therefore submitted that the trial court had given ample opportunity of being heard to the plaintiff, it cannot be said that the trial court has not exercised the jurisdiction properly but the trial court granted many adjournment to the plaintiff and therefore

the discretion vested by the trial court is based on sound principle of law and therefore this court may not interfere in this behalf.

CONCLUSION :-

6. I have considered the contentions raised by the learned advocate for the appellant and also learned advocate for the respondent in this behalf. I have considered the provisions of law also cited by both the counsels in this behalf. I have also gone through the judgment of the trial court as well as appellate court in this behalf. In this case the trial court originally dismsised the suit on 7th November, 2001, and before that also the trial court gave ample opportunities to the parties to hear the matter and only thereafter the trial court has dismissed the suit. Thereafter also the trial court further gave opportunity to the parties to hear the matter on 18.2.2002, 22.3.2002 and 30.3.2002. As plaintiff did not remain present and thereafter this application Exh.47 was granted. However after that the trial court rejected the application Exh.48. When the defendant was examined plaintiff did not remain present and thereafter he gave application for hearing of the suit. In my view, the trial court had given ample opportunity to the plaintiff to hearing of the matter. In fact repeated adjournments by the plaintiff in a suit filed against his own father is clearly an abuse of the process of law. In my view the appellate court has rightly exercised its discretion in rejecting the appeal and the trial court has given very cogent and convincing reasons and I do no see any reasons to interfere with the order of the appellate court and appeal therefore requires to be dismissed.

7. In my view the authorities cited by the learned advocate for the appellant particularly in the case of S.L.Franklin and others (supra), Balmiki Singh and others (supra), Sureshkumar Chowkse (supra) and Smt.Umrao Bai and others (Supra) and also Order 41 Rule 23A of the CPC are not applicable in this case.

8. In my view there is no substantial question of law arise in this behalf and therefore also the appeal is liable to be dismissed and accordingly the same is dismissed with no order as to costs.
9. As main matter is disposed of, no order on Civil Application No.7248 of 2002.

(K.M. Mehta, J.)
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